

On December 7, 2016, the Senate approved H.R. 34, the 21st Century Cures Act by a vote of 94 to 5. The new law includes the Special Needs Trust Fairness Act, which adds provisions to the law allowing competent individuals with disabilities to create their own special needs trusts.

Previously, special needs trusts could be established using assets of family members or other third parties or using the assets of the disabled beneficiary herself. However, the law requires a first-party special needs trust to be established on behalf of the disabled individual by a parent, grandparent, guardian or court; the disabled individual could not establish a first-party special needs trust on her own because the law assumed that the disabled individual was mentally disabled or incompetent to make such important decisions.

Disability advocates—including National Association of Elder Law Attorneys—believe that the inability of a person with disabilities to establish her own first-party special needs trust is insulting to the disabled individual and causes unnecessary complication. The existing law requires a physically disabled veteran, for example—to seek the assistance of his or her parents, grandparents, guardian, or a court in order to establish her own trust to hold her own assets.

This burdensome requirement provides no economic benefit to federal or state government, but could impose economic hardship on the disabled beneficiary, especially when a court is required to establish the trust.

The amendment simply adds a phrase allowing the individual to establish her own first-party special needs trust “established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court”. This small change has big consequences. Disabled beneficiaries with mental capacity to establish their own trust no longer need to seek the assistance of their parents, grandparents, guardians, or the court. They may now act on their own behalf to establish a first-party special needs trust and fund it with their own assets, without any undue legal difficulties.

The Special Needs Trust Fairness Act, if signed into law, will have a direct impact on anyone who may need to create a first-party special needs trust.

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